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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003	)	CG Docket No. 04-53

REPLY COMMENTS OF T-MOBILE USA

T-Mobile USA, Inc. ("T-Mobile") submits these comments in support of the petition for reconsideration that Cingular Wireless filed in response to the Commission's *CAN-SPAM Act Order*.[1]

All parties agree that wireless customers want their carriers to advise them of new services, plans, and product offerings. Indeed, the single opposition to Cingular's petition, filed by a mobile customer, acknowledges that Cingular is "correct" in stating that customers "expect and want their carrier to inform them of new products and services and new pricing plans that may be more advantageous to the subscriber."[2] T-Mobile agrees with Cingular, however, that the *Order* "failed to conduct the analysis of the carrier/customer relationship required by the [CAN-SPAM] Act,"[3] and that as a result, the Commission "failed to exercise the discretion delegated to it by Congress."[4]

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1 *See* Cingular Petition for Reconsideration, CG Docket No. 04-53 (Oct. 18, 2004); *Public Notice,* Report No. 2680 (Oct. 29, 2004); 69 Fed. Reg. 67736 (Nov. 19, 2004). *See also Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003,* CG Docket No. 04-53, *Order,* FCC 04-194, 19 FCC Rcd 15927 (Aug. 12, 2004), *summarized in* 69 Fed. Reg. 55765 (Sept. 16, 2004)("*CAN-SPAM Act Order*").

2 Shaw Opposition at 7, *quoting* Cingular Petition at 2.

3 Cingular Petition at 1.

4 *GTE v. FCC*, 224 F.3d 768, 775 (D.C. Cir. 2000)(supporting citations omitted).

I. THE ORDER FAILS TO DISCHARGE THE RESPONSIBILITY THAT CONGRESS HAS DELEGATED TO THE COMMISSION

In the CAN SPAM Act, Congress generally imposed for Mobile Service Commercial Messages ("MSCMs") an "opt-in" regime in order to "protect consumers from unwanted mobile service commercial messages."[5] However, recognizing that a special "relationship . . . exists between providers of [wireless] services and their subscribers," Congress further directed the Commission to consider adopting an "opt-out" regime for MSCMs that a wireless carrier sends to its own customers.[6]

The Commission has previously noted that preserving the ability of carriers to communicate with their customers promotes the public interest because such communications "often provide consumers with valuable information regarding products or services that they may have purchased from the company."[7] The Commission has similarly recognized that an "opt-out" regime adequately protects customer privacy rights and provides "a reasonable balance between the interests of consumers that may object to such calls with the interests of sellers in contacting their customers."[8] Nevertheless, the Commission declined to exercise the "opt-out" authority that Congress gave to it that would have facilitated useful carrier-customer communications while protecting the privacy of those customers not interested in receiving MSCMs from their own service provider.

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5 CAN-SPAM Act, § 14(b). In Section 14(b)(1) of the Act, Congress specified that the FCC "shall . . . provide subscribers to commercial mobile services the ability to avoid receiving mobile service commercial messages unless the subscriber has provided express prior authorization to the sender." 15 U.S.C. § 7712(b)(1).

6 In Section 14(c)(3) of the Act, Congress provided that the FCC "shall . . . take into consideration, in determining whether to subject providers of commercial mobile services to [the opt in provisions of] paragraph (1), the relationship that exists between providers of such services and their subscribers." 15 U.S.C. § 7712(b)(3). Under this provision, however, wireless carriers must permit their customers to opt-out from receiving such messages "(A) at the time of subscribing to such service; and (B) in any billing mechanism." *Id.*

7 *Telephone Consumer Protection Act Order,* 18 FCC Rcd 14014, 14043 ¶ 42 (2003).

8 *Id.* at ¶ 43.

The Commission reasoned that an "opt-in" regime is necessary to provide "greater consumer protection for wireless customers – protection that is not diluted by such an exemption":

> The Act itself requires us to protect consumers from "unwanted" commercial messages. * * * Congress' intent . . . was to afford wireless consumers greater protection from unwanted commercial electronic mail messages. Ultimately, we are persuaded that safeguarding wireless consumes from MSCMs, undiluted with an exemption from CMRS providers, will ensure that consumers receive "less, not more, spam."[9]

This explanation does not, however, address the question that Congress asked the Commission to consider. Of course, Congress determined that wireless customers should receive "less, not more, spam" and for that reason, deserve "greater protection" from spammers than other email users. But Congress *also* recognized that an "opt-out" regime could be appropriate for wireless carriers because of their special relationship with customers. T-Mobile submits that the Commission cannot discharge, and has not discharged, the task assigned to it simply by reciting the general Congressional policy without considering the *different* policy Congress recognized for the wireless carrier-customer communications.

The Commission additionally justified its decision on the ground that the "record" shows that MSCMs sent by wireless carriers are "not fundamentally different from those sent by other senders, other than they may be provided without additional cost to subscribers," with the Commission concluding that the fact that carrier-generated messages are "cost-free alone does not suffice as justification for an exemption."[10] T-Mobile must respectfully disagree. At the outset, Congress has determined in the voice and Short Message Service ("SMS") text messaging contexts that whether a customer is charged for the call or text message is an important consideration

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9 *CAN-SPAM Act Order* at ¶¶ 66 and 70.

10 *CAN-SPAM Act Order* at ¶ 70.

in determining the level of protections that are afforded to wireless customers.[11] There is no reason to think that this factor -- i.e. whether the customer pays for the message – should not also be treated as relevant in deciding the appropriate level of protection.

Moreover, the Commission's conclusion that the "record shows" that MSCMs sent by CMRS providers are "not fundamentally different" from those sent by others is factually inaccurate. The record evidence demonstrated numerous differences between MSCMs sent by wireless carriers and those sent by other businesses, in addition to providing "cost free" MSCMs. Only wireless carriers can offer customers an "opt-out" option at service initiation. Only wireless carriers will send MSCMs that are directly related to their wireless service. And perhaps most significantly, wireless carriers have incentives that are completely different than all other MSCM senders. As CTIA explains, in "the highly competitive CMRS industry, carriers are keenly aware that customers are able to take their business (and port their number) to a host of competitors should the carrier's service, prices, or policies displease their customers":

> With the myriad of competitive wireless plans available today and the advent of local number portability, no wireless carrier will risk alienating a subscriber by sending unnecessary or irrelevant messages. In fact, wireless carriers have substantial incentives to protect their customers from unwanted messages and are taking precautions to prevent them . . . .[12]

The Commission's conclusion that there are "no fundamental differences" between MSCMs sent by carriers and those sent by other senders is incompatible with the undisputed record evidence. And, in failing to acknowledge these differences, the Commission did not, as Congress specifically asked, "take into consideration . . . the relationship that exists between providers of such [wireless] services and their subscribers."[13]

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11 *See* 47 U.S.C. § 227(b)(1)(A)(iii).

12 CTIA Comments at 4.

13 *See* 15 U.S.C. § 7712(b)(3).

The Commission further suggested that carriers would not be harmed by its ruling because the "bulk" of carrier-customer communications are "already expressly exempted" under the transactional-and-relationship exemption.[14] But if this observation was accurate, there would have been no need for Congress to have established the "wireless carrier exemption" in the first place. In addition, the transactional-and-relationship exemption is much narrower in scope that what the Commission appears to believe. Consider the following examples:

- The Commission opines that advising a prepaid customer that his account balance is running low falls within the exemption.[15] The statutory exemption does permit a carrier to send a MSCM regarding "account balance information" but only "at regular period intervals." If a carrier does not send these messages "regularly," will the MSCM still fall within the exemption?
- The statutory exemption permits a carrier to provide "product updates or upgrades" but only if the customer is "entitled to receive [such updates] under the terms of a transaction that the recipient has previously agreed to enter." Will a carrier MSCM advising a customer that a $39/600-minute rate plan has been converted into a $39/800-minute plan fall within this exception if the customer is not legally "entitled to receive" such information in the subscription contract?
- Assume a customer has not used a credit under a promotional offer, and the carrier wants to remind the customer of the availability of this credit before the promotional period ends. The statutory exemption does permit one to send a MSCM to "facilitate, complete, or confirm a commercial transaction." The MSCM that carrier wants to send is not needed to "complete or confirm" the promotional offer. Will a judge or jury determine that the MSCM is appropriate to "facilitate" the promotion?

Carriers in communicating with their customers should not be required to undertake a legal review of each proposed customer communications in order to make an educated guess as to how a judge or jury will construe the message under the narrow restrictions contained in the statutory transactional-and-relationship message exception, and it was precisely for this reason that Congress created the wireless carrier exemption.

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14 *See CAN-SPAM Act Order* at ¶ 67.

15 *See id.*

T-Mobile submits that the Commission should encourage carriers to communicate efficiently with their customers, particularly using a medium that involves little or no incremental costs (because more costly alternatives such as bill inserts can impact the cost of service and the price paid by customers). Importantly, customers not wanting to receive such carrier communications *via* the MSCM medium can fully protect their interests *via* their "opt out" rights.

II. A RESPONSE TO MR. SHAW'S OPPOSITION

Only Mr. Shaw has opposed the Cingular petition. While Mr. Shaw agrees that customers "expect and want their carrier to inform them of new products and services and new pricing plans," he further asserts that Cingular is "incorrect in its assumption that customers expect and want this information to come by the way of text messages."[16]

Two points are apparent from Mr. Shaw's opposition. First, Mr. Shaw wants his wireless carrier to advise him of important developments that he may find advantageous. Second, for his carrier-customer communications, he wants the carrier to use a medium other than text messaging. But Mr. Shaw never adequately explains how his unique needs cannot be met by an "opt-out" regime. And, Mr. Shaw never explains why wireless customers that want to receive these important communications *via* text messages must undertake the affirmative burden of complying with a carrier's "opt-in" procedures. In addition, there are certain carrier communications cannot realistically be addressed in "other channels" such as a mass mailing (*e.g.,* you are about to lose a credit, your prepaid account minutes are low).

T-Mobile believes that Mr. Shaw's privacy interests can be fully protected through an "opt-out" regime. While Mr. Shaw suggests that an "opt-out" approach "places the burden on the consumer to take action to prevent MSCM interruptions,"[17] the "opt out" process, as pre-

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[16] Shaw Opposition at 7.

[17] *Id.* at 9.

scribed by the statute, is hardly burdensome. Moreover, Mr. Shaw does not recognize that an "opt-in" regime also requires customers who wish to receive information about new products and offerings from their carrier to take an affirmative step, and this "burden" on customers is at least as great as the "burden" of opting out. T-Mobile believes that the Commission would minimize the total "burden" on customers as a whole by exempting CMRS operators from the "opt in" regime imposed on MSCMs in the CAN SPAM Act.

III. CONCLUSION

In summary, the Commission has previously recognized that customers can obtain "valuable information" when carriers have the opportunity to advise them of new services or capabilities that may better meet their needs, and that customer privacy interests are amply protected by an "opt-out" provision that enables customers to be placed on a carrier's "do-not-email" list. T-Mobile believes that this is the appropriate policy balance in the context of MSCMs sent by wireless carriers to their subscribers, and consequently that the Commission should exercise the discretion given to it by Congress to exempt wireless carriers from the "opt-in" regime for MSCMs.

Respectfully submitted,

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Certificate of Service

I, Lorrie Turner, Manager, Federal Regulatory Affairs for T-Mobile USA, Inc., hereby certify that on this 16th day of December, 2004, courtesy copies of the foregoing Comments were sent via first class mail, postage prepared to the following:

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In addition, the comments were filed electronically in the Commission's Electronic Comment Filing System on the FCC website.

/s/ Lorrie Turner
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